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Commentary

An Inactive Asbestos Docket: Understanding The Risks

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The drumbeat for a Congressional solution to the asbestos crisis has never been louder. The reason for such noise is likely the result of several factors taking place simultaneously — the woes of asbestos becoming a staple in the mainstream press, including frequent mentions of studies predicting that the total bill could reach an eye-popping $275 billion; an insurance industry struggling for various reasons, with ever-increasing asbestos reserves seen as an important one of them; a growing list of corporate bankruptcies tied to asbestos; studies linking the asbestos crisis to lost jobs and other negative economic consequences; the White House occupied by a tort-reformer with a track record; and the U.S. Senate under Republican control, with this being a non-election year. If a Congressional solution can't be found under these circumstances, it is reasonable to wonder if it ever can.[1]

While there is more than one possible national solution to the asbestos crisis currently being floated, the one garnering the most attention is the establishment of federal medical criteria that must be met for a nonmalignant asbestos claim to be maintained.[2] This is effectively what is known in asbestos circles as an "inactive docket."[3] The premise is simple enough. Most of the cases being filed today are by people that may have been exposed to asbestos, but suffer no present asbestos-related impairment.[4] The argument is that, if these "unimpaired" cases are allowed to proceed, then their drain on remaining settlement dollars and judicial resources will prevent those who are "truly sick" from being adequately compensated and in a timely manner. The proposed solution — allow "unimpaired" plaintiffs to file their cases, enabling them to toll the statute of limitations, but then immediately transfer their cases to an "inactive docket," where they wait until their asbestos-related injury is serious enough to warrant the court's time. Imagine a trip to the deli, but instead of taking a number and simply waiting your turn to be served, you would also have to prove that you are hungrier than most of the other people in line.

There is nothing new about the concept, and, in fact, the use of inactive asbestos dockets. Some courts formally adopted them long ago, while others have created *de facto* inactive dockets — the natural result of channeling all of their resources to those asbestos plaintiffs with the most serious injuries. Historically, inactive dockets in Massachusetts, Chicago, Baltimore[5] and the federal court system have received the bulk of the attention.[6] Most recently, courts in New York and Washington have jumped on board.[7]

Even when asbestos litigation in only one jurisdiction is at stake, the creation of an inactive docket is an extremely controversial subject. Indiana is currently considering how to manage its asbestos docket and that question was the topic of a February 2003 symposium held in Indianapolis.[8]

When talk turns to the creation of a nationwide inactive asbestos docket, the debate, needless to say, intensifies.

On one side of the national debate, understandably, are plaintiff's attorneys with large inventories of cases involving individuals that would likely be relegated to the inactive docket. Hence, for many of their cases, a recovery and corresponding fee would enter a state of suspended animation, perhaps never to be realized. Fred Baron, a well-known asbestos plaintiff's attorney, testifying on September 25, 2002 before the United States Senate Judiciary Committee, on behalf of the Association of Trial Lawyers of America, described ATLA's position on federal medical criteria for asbestos claimants as one of *If the system ain't broke, don't fix it.* Specifically, Mr. Baron put it this way:

> ATLA believes that there is no valid basis for providing legal relief to solvent asbestos defendants or their insurers. Thirty years of actual experience in the state tort law systems, where over 500,000 asbestos victims have sought and obtained compensation for their injuries, is conclusive evidence that there is and (sic) no more effective mechanism for ensuring that victims get compensation than the tort system. Workers who have been injured by asbestos exposure are entitled to seek receive (sic) compensation under the laws of each of the 50 states in the tort system. Any proposed legislation should not include medical standards more restrictive than those used by state courts today, otherwise many injured workers who would otherwise be entitled to benefits will be left without a remedy for the harm they have suffered.

On the other side of the national inactive docket debate are asbestos defendants,[9] the insurance industry and asbestos plaintiff's attorneys that don't bother with what they likely perceive as the unripe fruit of asbestos litigation, instead limiting their practices to clients that were unquestionably impaired when they walked in the door. One such outspoken asbestos attorney is Steve Kazan of Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise, who also testified before the Senate Judiciary Committee on September 25, 2002. Interestingly, Mr. Kazan *also* took an *If it ain't broke, don't fix it* attitude with respect to the current asbestos litigation system, but not so when it came to the attorney participants.[10]

> In my view, what is wrong with asbestos litigation is due almost entirely to the huge number of claims filed each year by lawyers who have found people who are not sick. The problem is not the cancer cases or the serious asbestosis cases. There are only a few thousand cancer cases filed every year in the entire country and an even smaller number of asbestosis claims involving death or significant impairment. The courts and the defendants could deal with those cases, if they did not have to deal with many tens of thousands of claims brought by people who are not sick.

Mr. Kazan echoed a similar sentiment in his March 5, 2003 testimony before the Senate Judiciary Committee.

> I believe in trial by jury. I believe that the courts do a good job in dealing with claims brought by injured people against the people or companies that injured them. If asbestos litigation involved only 7,000-8,000 cancer cases a year and a few thousand more non-cancer claims involving real breathing impairment, no one would be arguing the need for significant reforms. Certainly I would not.

There are numerous law review-esque issues that go into the decision and permissibility of adopting an inactive docket.[11] It is not the purpose of this Commentary to examine such issues, or the nuts and bolts of any inactive asbestos docket proposal that is currently being debated. Rather, this Commentary will provide a brief summary of two current inactive docket proposals (one federal and one state) and a discussion of whether they will live up to their promise.

Current Inactive Docket Proposals

On February 13, 2003, Senator Don Nickles (R-Okla.) introduced the Asbestos Claims Criteria and Compensation Act of 2003 (S. 413) ("the Federal Asbestos Act"). The Federal Asbestos Act starts out with a lengthy Findings and Purposes section, full of facts and figures (which many would dispute) that outline why the current state of asbestos litigation has reached the point of requiring Congressional intervention.[12] At the heart of the Federal Asbestos Act is section 4, which provides as follows:

> SEC. 4. PHYSICAL IMPAIRMENT
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> (a) IMPAIRMENT ESSENTIAL ELEMENT OF CLAIM — Physical impairment of the exposed person, to which asbestos exposure was a substantial contributing factor, shall be an essential element of an asbestos claim. For purposes of this section, cancer shall be presumed to involve physical impairment.
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> (b) PRIMA FACIE EVIDENCE OF PHYSICAL IMPAIRMENT —
>
> (1) IN GENERAL — No person shall bring or maintain a civil action alleging a nonmalignant asbestos claim in the absence of a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor.

The Federal Asbestos Act goes on to define, using specific objective medical criteria, what is required to establish a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor. Under the Federal Asbestos Act, a person that has not yet discovered that they are physically impaired by an asbestos-related nonmalignant condition need not file a claim out of concern over the statute of limitations. Thus, the Federal Asbestos Act is not an "inactive docket" statute *per se*. Rather, it operates to create a *de facto* "inactive docket."

In addition, the Federal Asbestos Act contains important provisions governing consolidations of cases, venue, statute of limitations and retroactivity. It is beyond the scope of this Commentary to discuss these provisions in detail, each one of which is hugely controversial and has enormous potential consequences on the state of asbestos litigation. In general, the Federal Asbestos Act precludes the consolidation of cases without all parties' consent; limits venue to the plaintiff's home state or state of exposure (with the exception of cancer cases with a life expectancy of less than three years); creates federal jurisdiction for any case in which a state court refuses or fails to apply the Act; provides that the statute of limitations shall not begin to run until the plaintiff discovers that they are physically impaired by an asbestos related nonmalignant condition; creates a two-disease rule,[13] and provides that the Act shall apply to any asbestos case in which trial has not commenced as of the effective date.

On February 14, 2003, the Texas Senate introduced S.B. No. 496, a bill that would create a true "inactive docket" for asbestos claims in the state ("the Texas Asbestos Act"). Under the Texas Asbestos Act, all asbestos claims, with the exception of those containing documentation to sup-

port a diagnosis of cancer, are immediately placed on the inactive docket, which actually exists, and whose creation is authorized under the Act by the Texas Supreme Court. Once on the inactive docket, the statute of limitations is tolled, the claim is not subject to any orders of the trial court and discovery may not proceed.

Any claimant seeking to transfer their claim from the "inactive docket" to the "active docket" must file a petition for removal with the trial court (such petition can be filed simultaneously with the complaint). The petition for removal must be accompanied by documentation necessary to establish, by a preponderance of the evidence, a diagnosis of impaired asbestosis or other specific, nonmalignant asbestos-related condition accompanied by a substantial, verifiable physical impairment substantially caused by the asbestos-related condition. The Texas Asbestos Act goes on to provide specific objective medical criteria required to satisfy impairment.

An important difference between the Federal Asbestos Act and the Texas Asbestos Act is how the two treat disputes over whether the impairment criteria have been established. The Federal Asbestos Act is virtually silent on this point, stating only that, "The defendant shall be afforded a reasonable opportunity to challenge the adequacy of the proffered prima facie evidence of asbestos-related impairment."[14] The drafters of the Texas Asbestos Act, on the other hand, take a more realistic approach to the potential for such disputes. They clearly foresee them and provide detailed procedures for how they should be resolved. More about this below.

Even if all sides agree to the concept of an inactive docket, much debate can still be expected over the specifics of the objective medical criteria that will be used to distinguish between an "impaired" and "unimpaired" plaintiff. This is no simple task, and is at the heart of which asbestos plaintiffs will be granted access to the court house, and which will be left outside, possibly forever. For example, consider the March 5, 2003 testimony of Dennis Archer, President-elect of the American Bar Association, before the Senate Judiciary Committee. Mr. Archer, after discussing the need for objective medical criteria, stated:

> The ABA believes that Congress should enact a Standard like the one developed by the ABA Commission or a similar appropriate Standard that would: (a) identify non-malignant claims that are entitled to compensation and defer those that do not currently belong in the courts, . . .

Mr. Archer then went on to praise the extent of the effort that the ABA put into developing its objective medical criteria,[15] only to offer the following sobering conclusion:

> In drafting this Standard, the Commission attempted to achieve its goal of deferring only those claims involving individuals who are not impaired as a result of exposure to asbestos. As will be seen below, in several instances the Standard adopts less restrictive alternatives than some physicians recommended. *The effect of this may be to allow claims that do not really belong in the tort system*, but the ABA prefers to take that approach rather than to unfairly exclude any significant number of deserving claims.

An Inactive Asbestos Docket — Changing The Litigation Dynamics

It is certainly not a secret that, at the core of the asbestos problem, is the tremendous volume of cases that have been filed. If the litigants and courts tried to resolve such an astronomical number of cases one-by-one, using all of the traditional tools of litigation, the system would have long-ago collapsed under its own weight. As a result, asbestos litigation took on its own set of rules. The RAND Institute for Civil Justice recently described it this way:

> Many of those involved in asbestos litigation devised procedures to streamline the process and reduce the burdens and costs they faced. Courts developed formal and informal approaches to managing asbestos litigation. A series of court decisions resolved most of the coverage disputes between defendants and insurers.[16] Many defendants chose not to aggressively contest liability and instead negotiated settlements of large numbers of cases with leading plaintiff attorney firms. These agreements typically called for settling hundreds or thousands of cases per year at amounts specified in administrative "schedules" that reflected differences in injury severity and other characteristics deemed to affect the value of cases.[17]
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> * * *
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> By the mid-1980s, however, plaintiff law firms in areas of heavy asbestos exposure (such as jurisdictions with shipyards or petrochemical facilities) had learned that they could succeed against asbestos defendants by filing large numbers of claims, grouping them together and negotiating with defendants on behalf of the entire group. Often defendants would agree to settle all of the claims that were so grouped, including those claims that were questionable, to reduce their overall costs of litigation.[18]

Thus, it is not surprising that, under the current system of asbestos litigation, trials have been infrequent events. RAND has calculated that, using *Mealey's Litigation Report: Asbestos* as a reference, only 527 asbestos cases, involving 1,598 plaintiffs, reached verdict between 1993 and 2001.[19]

The proponents of an inactive asbestos docket argue that the use of medical criteria will reduce the number of asbestos cases in the system, thereby enabling it to operate in a manner that more closely resembles traditional litigation. For example, the American Bar Association, one of the leading proponents of an inactive docket, stated that one of its concerns in drafting asbestos recommendations for its House of Delegates was, "Protecting the rights of claimants with impairing asbestos-related injuries to obtain fair compensation efficiently in the tort system."[20] The Alliance of American Insurers, a trade association that represents the interests of more than 340 property-casualty insurers, in a February 19, 2003 press release praising Texas Senate Bill 496, stated that the bill "will raise the bar for the criteria necessary to bring an asbestos personal injury lawsuit, so that the truly impaired may have their day in court." The trade association repeated this statement in a March 25, 2003 press release, responding to news that SB 496 had passed the Texas Senate State Affairs Committee.

The Asbestos Alliance, a non-profit organization comprised of asbestos defendant companies, trade associations, insurers and others seeking Congressional legislation to solve the asbestos crisis, in a statement concerning the March 5, 2003 Senate Judiciary Committee hearing on asbestos, listed the following among the goals that would be achieved by the creation of objective medical criteria for asbestos-related impairment:

- Ensure that the truly sick have immediate access to the courts
- Address the heart of the problem by eliminating the tens of thousands of questionable claims overloading the system and shift resources to the truly sick
- Keep cases in the courts and make it possible for America's civil justice system to work

Mr. Kazan, whose views on an inactive docket have been applauded by The Asbestos Alliance, testified on March 5, 2003 before the Senate Judiciary Committee that, "A medical criteria bill would relieve this pressure [describing mass consolidations designed to force settlements]. It would let the courts go back to doing what they do best — resolving real cases and controversies between genuinely injured people and the defendants that they allege caused their injuries. In my view, this solution is most consistent with traditional American values."

An Inactive Asbestos Docket Does Not Mean Inactive Defense Costs

The proponents of an inactive docket argue that by reducing asbestos dockets to manageable numbers of cases, it will enable them to be handled more in line with the way that the tort system was designed to operate. Attorneys for plaintiffs and defendants, freed up from the necessity of mass settlements, would now be in a position to use the traditional tools of the adversary process — discovery, motion practice, rules of evidence and trial by jury — to award compensation to those that are truly injured, based on the proven fault of those that are truly responsible. This is certainly a laudable goal. Indeed, if the legal system had the equivalent of a Hippocratic Oath, surely it would sound something like that.

It is anyone's guess as to how many claims per year would find their way into the court system if an inactive docket proposal is adopted. Even if we knew now which medical criteria for impairment will be adopted, the number of claims that would satisfy such criteria would still likely remain a subject of speculation. Suffice to say, it would be a lot less than there are now, but, still, no small amount. As stated above, Steve Kazan, testifying recently before the Senate Judiciary Committee, suggested that there may be 7,000-8,000 cancer cases filed each year, along with a few thousand more non-cancer claims involving real breathing impairment.[21]

Regardless of the number of claims that would satisfy medical criteria of impairment, it is reasonable to assume that, even if global settlements don't go the way of the do-do bird, asbestos litigation that involves significantly fewer cases is sure to result in many more of them proceeding further down the litigation road, including those that actually reach a courtroom. While many will view a reduction in the use of global settlements as an important measure of success in reforming the system, it is likely to come with a price — increased defense costs.

The current system for handling asbestos litigation has resulted in decreased defense costs. The return to more of the traditional components of the adversary process, such as discovery, motion practice and stricter proof of causation, will likely result in higher defense costs than under the present system. RAND describes this situation, from a historical perspective, as follows:

> [T]he transactions (sic) costs associated with asbestos litigation soon grew as a fraction of total asbestos spending. The asbestos environment in the 1980s was highly litigious: Defendants disputed among themselves regarding responsibility for the asbestos at a site; defendants and insurers disputed over a host of coverage issues; and plaintiffs, defendants, and insurers vigorously disputed issues of causality, illness, etc. As a result, defense transactions costs increased and the share of total spending that claimants recovered net of their legal fees and expenses fell to about 34 percent of the total.
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> A number of these issues were essentially worked out in the late 1980s and early 1990s in the form of formal judicial decisions, agreements among defendants and insurers regarding joint defense efforts and coverage issues, and agreements between some plaintiffs' attorneys and defendants to settle claims according to a

> schedule of payments by claim type. These arrangements led to reduced defense litigation costs.[22]

At the outset, an inactive asbestos docket is likely to result in increased defense costs on account of the very creation of the inactive docket itself. There are certain to be battles fought over whether a plaintiff meets the medical criteria for impairment. As mentioned above, the drafters of the Texas Asbestos Act foresee this and propose detailed procedures for resolving such disputes. The transaction cost of these fights, with the very survival of the claim in the balance, are likely to qualify as "defense costs" for insurance coverage purposes.

Some might say that these disputes should not materialize because the very purpose of adopting *objective* medical criteria of impairment is to avoid them. However, there is abundant evidence that inactive dockets are likely to spawn collateral litigation over satisfaction of the medical criteria, no matter how objective the standards. Consider the following. RAND reports that, in 1995, the Manville Trust implemented an audit program in which independent B-readers reviewed the X-rays submitted by a random sample of claimants. The review process was designed to give the benefit of any doubt to the claimant, downgrading the claim only if both B-readers independently determined that they saw no indication of even low-level, sub-diagnostic X-ray evidence of interstitial fibrosis. Fifty percent of the X-rays reviewed failed this independent B-reader review.[23] For a more in-depth look at Manville audits and their staggering results, see Roger Parloff's Commentary — "Mass Tort Medicine Men" — in the January 15, 2003 issue of *The American Lawyer*. Parloff notes that, "According to an April 1998 Manville Trust memorandum, the ten physicians most frequently used by plaintiffs' firms at the time of the audits had an average failure rate of 63 percent."

Based on these statistics, it is clear that even when a plaintiff claims to have met the objective medical criteria of impairment, not every defendant will be convinced. And for good reason, as the Manville audit data show. The Texas Asbestos Act seeks to address this problem by providing that, for purposes of attempting to remove an asbestos claim from the inactive docket, a chest X-ray taken or interpreted by a person directly or indirectly employed or compensated by the claimant's attorney may not be used. This is a reasonable provision and something that Congress should consider. However, even the use of B-readers that are absolutely independent is not likely to prevent defendants from challenging the results. Again, for good reason. As Parloff notes concerning the Manville audits, "The lung conditions being diagnosed are so marginal and subjective that even the trust's own B-readers frequently disagreed with each other's asbestosis diagnoses, rendering inconsistent interpretations between three percent and 36 percent of the time, depending on the pair of B-readers being compared."

Thus, right off the bat, the employment of an inactive asbestos docket is likely to result in increased defense costs as the parties go to battle over this linchpin issue. And while the cost of this preliminary fight on the defense side may have been borne by several parties, thereby minimizing each one's individual share, the cost for the plaintiff's attorney was his or hers alone to shoulder. Thus, it is reasonable to assume that the time and expense that the plaintiff's attorney was required to incur to prove a case worthy of being on the active docket will likely show up in settlement demands. After all, when a widget maker experiences an increase in its cost of goods sold, it increases the price of its widgets.

However, this is only the beginning of increased costs — both defense and settlement — that are likely to come with an inactive asbestos docket. If plaintiff's attorneys are forced to rid themselves of their unimpaired cases, they will likely seek to make up the difference by increasing the settlement demands for their remaining cases. However, the bases for such increased demands may be more than just simple economics or human nature at work. Increased settlement demands may also be the result of plaintiff's attorneys having more time to devote to the development, discovery and preparation of their cases. By doing so, they may realize that their cases

against some "peripheral" defendants are in fact stronger than originally thought. Of course, this extra work-up should also enable plaintiff's counsel to realize that their cases against some peripheral defendants are completely without merit, and they should act accordingly by deleting their names from future captions. Thus, for various reasons, a decrease in plaintiff's attorneys' case loads is likely to result in increased settlement demands, which are likely to result in larger settlements being paid by willing defendants. That's simple enough. However, it is only part of the story.

Increased settlement demands could not be coming at a worse time for asbestos defendants, especially publicly-traded ones, and their insurers. These entities are currently facing tremendous external pressure to minimize their asbestos exposure. For a publicly traded company (whether insured (in whole or in part) or not), any hint of the word asbestos has become a plague on its share price.

Consider RPM International, Inc. and the conference call that went awry. Compared to many defendants, RPM, a specialty-coatings maker, could be called a minor player in the asbestos game, with *only* 1,490 active cases as of November 30, 2002. During a Friday January 10, 2003 quarterly conference call, RPM stated that its asbestos liability insurance coverage is likely to expire sometime in fiscal 2004. That day, RPM's shares fell 21% on the New York Stock Exchange. When trading resumed on January 13, shares were off as much as an additional 14%, closing down 4.9% at $11.49. RPM responded that the market was overreacting, given that the insurance coverage issue had been disclosed in prior securities filings. To date, RPM's shares have yet to recover.[24] Also consider Dow Chemical, and how its asbestos exposure is perceived. A late February 2003 *Dow Jones Newswire* story, discussing Dow Chemical's recently filed annual report, devoted well over half of its text to a discussion of the asbestos liabilities of Dow's Union Carbide unit.[25]

It isn't just defendants that are having their asbestos liabilities placed under a microscope. For insurers, the rating agencies are no doubt paying very close attention. In recent months, Travelers and ACE both took significant and well-publicized increases in their asbestos reserves. As well, Hartford announced that it would be undertaking a comprehensive study of its asbestos exposure. In response to the Travelers and ACE moves, Standard & Poor's announced that it would review the adequacy of asbestos reserves with management of 27 insurance groups that S&P identified as having significant asbestos exposure. S&P stated that if a company's reserves appear "materially deficient," it will review their plans for dealing with the problem and "adjust ratings as needed."[26]

Even an insurance equity analyst, a profession normally known for having a *glass is half full* view of the world, was unconvinced that Congressional action on asbestos could bring relief to the industry. Speaking earlier this year to the National Conference of Insurance Legislators, Alice Schroeder of Morgan Stanley stated that even if Congress takes action, insurers would still have to pay, as the money would shift from the unimpaired to the impaired.[27]

Thus, if asbestos defendants are asked to pay more to settle cases, it is not unreasonable to assume that some are going to be unwilling, or unable, to do so. Such defendants (and their insurers) will find themselves with no choice but to litigate the issues of liability, such as the plaintiff's exposure to the defendant's asbestos and causation. Not to mention, such litigation will likely be taking place at a more rapid pace to which they have become accustomed, given that the asbestos docket will be less crowded. As a result, increased settlement demands are likely to force more cases to trial or at least further down the litigation path. After all, nothing forces a case to trial more than a settlement demand that is viewed as unreasonable by the defendant. And as more cases go to trial, or at least get closer to it, defense costs will travel in only one direction. It also should not be forgotten that, time and time again, it has been proven that defendants — even those that like their chances — take a serious risk when they decide to place an asbestos case into the hands of a jury.[28]

Increased defense costs have significant potential implications for all three of the direct stakeholders in asbestos litigation — insurers, asbestos plaintiffs and defendants.

For asbestos defendants being defended by their primary insurers, any increase in defense costs will likely be borne by such insurers, in whole or in part, *supplemental* to the policies' limits of liability. Simply put, this is a source of tremendous potential additional exposure for these insurers.

For asbestos defendants that have exhausted their primary coverage and are now into their excess layers (where the bulk of the total available limits of liability tend to be found), it is likely that some or all of their policies have "ultimate net loss" limits. Translation: every dollar paid in defense will likely result in a dollar reduction in the defendant's remaining insurance limits. In other words, every dollar paid in defense is one dollar less that is available to compensate asbestos plaintiffs themselves. Thus, while increased defense costs that are solely an additional burden on primary insurers may not be viewed as having a direct impact on the funds available to compensate plaintiffs, the same can not be said about excess policies. If one of the main goals of an inactive docket is to preserve funds for the most seriously injured, having defendants with ultimate net loss policies undertake protracted litigation is not likely to achieve it.

For uninsured defendants, whether they are completely uninsured or paying an uninsured contribution, increased defense costs are not a matter of such insurance coverage nuances as *supplemental* or *ultimate net loss*. Rather, for these defendants, there is only one type of defense cost, that which must be paid directly out of their pockets. Clearly, for uninsured defendants, increased defense costs will have a direct impact on their ability to pay settlements or verdicts, and for how long.

Conclusion

It has now been nearly four years since Justice Souter used the term *elephantine*[29] in *Ortiz v. Fibreboard Corp.*[30] to describe the size of asbestos litigation and call for national legislation. While a national inactive asbestos docket is not a peanut-size solution, it is also a long way from a panacea. Its utility likely lies somewhere in the middle. A national inactive asbestos docket may have certain unintended consequences when it comes to the impact of any increased defense costs on insurance coverage. It is important that proponents of an inactive asbestos docket approach this purported solution with their eyes open, understand the risks and recognize that they may be trading one series of problems for another. Perhaps the moral of the story is that when a problem reaches the size, dimension and complexity that asbestos has, Congress simply may not be able to provide a solution in the form of a magic bullet. Not this time, at least.

ENDNOTES

1. Even the current war in Iraq does not appear to be slowing the Congressional train on this issue. On March 26, Senate Judiciary Committee Chairman Orrin Hatch (R-Utah) met with some of the major stakeholders in asbestos litigation and set April 10 as the deadline for having a reform bill, with committee debate on the bill to take place in late April or early May. Dennis Kelly, "Senator Wants Asbestos Bill Ready for Debate in Committee," *BestWire Services*, March 27, 2003.

2. The other national asbestos solution being debated calls for the creation of a National Asbestos Claims Facility. Under this scenario, asbestos defendants and insurers would fund a claims facility which would become the exclusive remedy for all victims of asbestos-related disease, with compensation levels based on schedules. In general, the proponents of this solution argue that by removing the burdens of litigation, compensation will be awarded in a more speedy manner, with a significant reduction in transaction costs. For an explanation of the proposed National Asbestos Claims

Facility, see David Austern's March 5, 2003 testimony before the Senate Judiciary Committee. Mr. Austern serves as President of Claims Resolution Management Corporation and General Counsel for the Manville Personal Injury Settlement Trust. See also the March 5, 2003 Senate Judiciary Committee testimony of Jonathan Hiatt, General Counsel of the AFL-CIO, which advocates for "a no-fault administrative compensation plan for asbestos victims that would largely replace civil court litigation as the means by which asbestos victims are compensated for their injuries."

3. As used in this Commentary, the term "inactive docket" means, in addition to a formal inactive docket, a deferred docket, pleural registry and a *de facto* inactive docket (the result of a court channeling all of its resources to those asbestos plaintiffs with the most serious injuries).

4. While the Asbestos Claims Criteria and Compensation Act of 2003 (S. 413), discussed *infra.*, uses the terminology "no present asbestos-related impairment" to describe many of the people filing asbestos claims today (see Section 2(a)(11)(c) of the Act), it should be noted that not everyone agrees that so-called unimpaired plaintiffs are in fact *unimpaired*. For a discussion of this topic, see Robert T. Haefele, "The Hidden Truth About Asbestos Disease," *Mealey's Litigation Report: Asbestos*, Vol. 18, No. 2, February 18, 2003, at 31. (Attorney representing asbestos plaintiffs states, "But whether a plaintiff has a devastating injury like mesothelioma or a more moderate injury like asbestos pleural disease, to prevail in any tort litigation, a plaintiff must still show some injury has been sustained. No state permits a person who has not been diagnosed with an asbestos-related disease to prosecute an asbestos claim. Any implication that people filing claims today have not been diagnosed with an asbestos disease is misleading.").

5. *The Wall Street Journal* recently reported that of the 14,713 cases placed on Baltimore's inactive docket since its inception in 1992, 40% were eventually activated for trial. Susan Warren, "Swamped Courts Practice Plaintiff Triage," *The Wall Street Journal*, January 27, 2003, at B1.

6. For a discussion of the inactive dockets in these states, and other issues related to the use of inactive dockets, see Mark A. Behrens, "Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs," 33 *Tex. Tech L. Rev.* 1 (2001). A recent Commentary in *Mealey's Litigation Report: Asbestos* notes that pleural registries have also been established by the circuit court of Milwaukee, the superior courts of Atlanta and Los Angeles, as well as federal district courts in Hawaii, Connecticut, Northern Oklahoma and Western New York. Eric Hellerman, "The Asbestos Litigation Crisis: Who Will Clean Up This Elephantine Mess?," *Mealey's Litigation Report: Asbestos*, March 21, 2003, at 40. (Describing what it will take for pleural registries to succeed, this commentator states, "[U]ntil and unless all or substantially all localities in the nation enact rules to prevent unimpaired claimants from prosecuting their claims — or, to put it another way, so long as there is a Mississippi or a West Virginia for unimpaired claimants to file claims in — local initiatives such as these [pleural registries] will only move the problem, not solve it.").

7. See John S. Stadler, "State Court Asbestos Rulings Provide Guidance to Congress," Legal Opinion Letter of the Washington Legal Foundation, January 31, 2003 (Arguing that trial court decisions in late 2002 in New York City and Kings County, Washington, transferring minimally impaired or unimpaired cases to deferred or inactive dockets "should provide guidance for Congress as it considers the United States Supreme Court's call for a national legislative solution to the 'elephantine mass of asbestos cases.'").

8. See Ron Browning, "ABA Seeks Restrictions on Asbestos Litigation from Federal Lawmakers," *Indiana Lawyer*, February 26–March 11, 2003.

9. See the January 29, 2003 testimony of Michael E. Baroody, Executive Vice President of the National Association of Manufacturers and Chairman of The Asbestos Alliance before the Senate Banking Committee. Mr. Baroody testified, "It is essential not only to ensure that the sick and dying obtain the compensation they deserve, but also to protect the other victims of asbestos litigation — shareholders, employees, and communities that are injured when companies are made the targets of thousands of frivolous lawsuits."

10. The rift between Fred Baron and Steve Kazan pre-dates their September 25, 2002 appearances before the Senate Judiciary Committee. Their disagreement was documented five months earlier in a *Wall Street Journal* cover story. See: Susan Warren, "As Asbestos Mess Spreads, Sickest See Payouts Shrink," *The Wall Street Journal*, April 24, 2002, at A1.

11. See Behrens, *supra.* note 6 at n. 123, citing Peter H. Schuck, "The Worst Should Go First: Deferral Registries in Asbestos Litigation," 15 *Harv. J.L. & Pub. Pol'y* 541 (1992), for an article that well documents how inactive docket plans comport with the right to a jury trial, full access to the courts, due process, takings issues, equal protection and overall federalism concerns.

12. Section 2(b) of the Federal Asbestos Act lists the following four purposes:

> (b) PURPOSES — It is the purpose of this Act to —
>
> (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by asbestos;
>
> (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become sick in the future;
>
> (3) enhance the ability of the Federal and State judicial systems to supervise and control asbestos litigation and asbestos-related bankruptcy proceedings; and
>
> (4) conserve the scarce resources of the defendants, and marshal assets in bankruptcy, to allow compensation of cancer victims and others who are physically harmed by exposure to asbestos while securing the right to similar compensation for those who may suffer physical harm in the future.

13. Section 6(b) of the Federal Asbestos Act provides as follows:

> (b) TWO-DISEASE RULE- An asbestos claim arising out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person arising out of asbestos-related cancer. No damages shall be awarded for fear or risk of cancer in any civil action asserting only a nonmalignant asbestos claim.

14. The Federal Asbestos Act, Section 5(c).

15. Mr. Archer stated, "[R]ather than adopt existing criteria from some other source, the Commission developed its criteria only after interviewing pulmonologists and occupational medicine specialists, including doctors who had testified for both plaintiffs and defendants in asbestos litigation."

16. This coverage attorney would dispute that statement.

17. Stephen J. Carroll, et al., "Asbestos Litigation Costs and Compensation: An Interim Report (2002)," RAND Institute for Civil Justice, at 2.

18. *Id.* at 23.

19. *Id*. at 56. Not surprisingly, Fred Baron, in his September 25, 2002 testimony before the Senate Judiciary Committee, points to the infrequency of asbestos trials as proof that the current system is working to compensate claimants in an expeditious manner. Among other things, Mr. Baron stated, "The fact that in excess of 50,000 claimants per year receive payments and only a very small number of the cases are tried to verdict, signals that this system is working for the vast majority of injured victims."

20. See Testimony of Mr. Dennis Archer, President-elect of the American Bar Association, before the Senate Judiciary Committee, March 5, 2003.

21. On the question of how many asbestos cases would remain in the system if medical criteria of impairment are adopted, consider the March 5, 2003 testimony of Mr. Dennis Archer, President-elect of the American Bar Association, before the Senate Judiciary Committee:

> A recent RAND report noted that some studies claim that somewhere between two-thirds and 90% of new claims are now brought by individuals who have radiographically detectable changes in their lungs that

> are "consistent with" asbestos-related disease (and with dozens of other causes), but have no demonstrated functional impairment from those changes.

Of course, which medical criteria for impairment are adopted will surely impact this number.

22. Stephen J. Carroll, et al., "Asbestos Litigation Costs and Compensation: An Interim Report (2002)," RAND Institute for Civil Justice, at 60.

23. *Id.* at 20.

24. Roger Cheng, "RPM's Stock Continues to Slide on Asbestos Comments," *Dow Jones Newswires*, January 13, 2003. RPM's shares closed at $10.87 on March 27, 2003.

25. Chad Clinton, "Dow Chemical Unit Had $2.2B Asbestos Liability At Dec 31," *Dow Jones Newswires*, February 28, 2003.

26. Douglas McLeod, "Asbestos Revisions Continue," *Business Insurance*, February 3, 2003, at 1.

27. Dennis Kelly, "Equity Analyst Warns of More U.S. Insurer Insolvencies," *BestWire Services*, February 24, 2003.

28. See Hellerman, *supra.* note 6 for a list of asbestos "mega-verdicts" that have come down in the past eighteen months.

29. A federal and state search on Lexis of the term "elephantine" resulted in 54 hits, with many of the uses of the term being just as clever as Justice Souter's. My personal favorite: Judge Mukasey in *In re: Gulf Oil/Cities Service Tender Offer Litigation*, 725 F. Supp. 712, 728 (S.D.N.Y. 1989) ("The parties' elephantine briefs do not discuss choice of law.").

30. 527 U.S. 815, 821 (1999). ■

